IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
PETER A. HALL
1630 Fourth Avenue North
Birmingham, Alabama

Attorneys for Petitioner

FRANK HEFFRON
MICHAEL MELTSNER
MELVYN ZARR
Of Counsel

INDEX

Table of Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

Petitioner respectfully urges the Court to rehear this capital case for the following reasons:

1. The opinion of the Court establishes rules governing proof of racial discrimination in jury selection which, as a practical matter, will be incapable of administration at the trial level wherever a jury commission has been compelled to abandon exclusion of Negroes and has moved to token inclusion.

2. The opinion of the Court reflects incomplete appreciation of evidence in the record demonstrating state-initiated racial distinctions infecting the jury selection process.

I.

The Rationale of the Court's Rejection of Petitioner's Claim of Exclusion of Negroes From Jury Venires Represents a Sharp Departure From Previous Decisions and Entails Grave Consequences Not Adequately Considered in the Briefs or the Argument or the Opinion of the Court.

The Court holds that petitioner has failed "in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment", 33 U. S. L. Week 4231, 4232, because there was no "meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners", 33 U. S. L. Week at 4233, and "purposeful discrimination based on race alone is [not] satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10 per cent", 33 U. S. L. Week at 4233.

A. No prior decision of this Court has required as part of establishing a prima facie case a showing that Negroes are as well qualified as whites. On the contrary, the rule of exclusion, as it has been known heretofore, has required only a showing of a class constituting a distinct portion of the population and a pattern of systematic non-representation of that class, whereupon the state has been required to justify that non-representation. Both petitioner and respondent argued this cause on the premise that the burden of showing inequality between the races rested on the state, and the state attempted to assume that burden at the hearing in the Circuit Court through the use of spurious and irrelevant statistics on the incidence of venereal disease and receipt of public assistance. The burden of showing equality between the races is not one which a

Negro petitioner may realistically be expected to meet, and this Court should not place that burden upon him without considering briefs and arguments directed squarely toward the issue.

The Court appears, from its opinion, willing to entertain a rebuttable presumption that Negroes as a class are not as well qualified as white persons under constitutionally acceptable standards. Such a presumption flies in the face of the teachings of the Court since the turn of the century.[1] Moreover, if the incidence of disqualifying factors is higher among Negroes in a given county, the jury commissioners, who presumably have observed these factors, will be easily in the best position to offer proof of them; then the Negro defendant will be justly put to his proof in rebuttal. But this is a far different thing from a presumption by the Court of racial inequality.

The rule to date, as petitioner understood it, was as stated in *Cassell* v. *Texas*, 339 U. S. 282. There, Mr. Justice Reed, announcing the judgment of the Court, pointed out that although Negroes constituted 15.5% of the population, they constituted only 6.7% of the grand jury panels—a discrepancy of the same order of magnitude as that presented in the instant case. Mr. Justice Reed's opinion held that:

> An individual's qualifications for grand-jury service, however, are not hard to ascertain, and with no evi-

[1] Such a rule conflicts with the purpose of the Fourteenth Amendment, see *Strauder* v. *West Virginia*, 100 U. S. 303, 306, for it implies that Negroes are known to be less qualified and should therefore prove that they possess the same qualifications as whites. Attempts to impose such a burden have been rejected in the past. *Neal* v. *Delaware*, 103 U. S. 370, for example, reversed a "violent presumption" of a state court that Negro exclusion was due to their lack of qualifications.

> dence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements for jury service. 339 U. S. at 288-289.

Also, in *Arnold* v. *North Carolina*, 376 U. S. 773, the Court found a prima facie showing of jury exclusion, absent proof of the qualifications of Negroes in the community.[2] See also *Reece* v. *Georgia*, 350 U. S. 85, 88 (the burden on the state); *Patton* v. *Mississippi*, 332 U. S. 463, 468; *Norris* v. *Alabama*, 294 U. S. 587, 591 (Negroes 7.5% of the population, none on juries; prima facie case of denial).[3]

The lower courts—which must actually administer any rule required by the Court—have also placed the burden on the state to prove that Negroes are not as well qualified as whites. The United States Court of Appeals for the Fifth Circuit has held that the burden is on the state, not Negro defendants, to show that voter registration officials freely and fairly register qualified Negroes as electors, if such is the standard for jury service, because "the fact [rests] more in the knowledge of the State." *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 78 (5th Cir. 1959). That decision was followed in *Harper* v. *Mississippi*, —— Miss. ——, 171 So. 2d 129 (1964).[4] This Court's decision

---

[2] No proof was offered of intelligence and good character, the qualifications for jury service provided by North Carolina G. S. §9-1.

[3] To be sure, the Court has always treated evidence of the qualifications of Negroes as relevant, *Norris* v. *Alabama*, 294 U. S. 587, 598, but there is no suggestion in the cases that one claiming discrimination must affirmatively show that Negroes are as well qualified as whites.

[4] See *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 59 (5th Cir. 1962), where the Court relied upon the fact that "[t]here was no testimony . . . that, on the average, Negroes in Mobile County are any less qualified for jury service than are whites." See also *Bailey* v. *Henslee*, 287 F. 2d 936 (8th Cir. 1961); *Henslee* v. *Stewart*, 311 F. 2d 691 (8th Cir. 1963).

would have forced the defendant in both *Goldsby, supra,* and *Harper, supra,* to show that Negroes were as well qualified as whites to meet the selection standards of the state as to voter registration, a task difficult enough for the Department of Justice,[5] and no doubt impossible for individual defendants. It must be remembered that virtually all Negro defendants in capital cases are indigent and usually are represented by local Negro counsel whenever the jury issue is raised, see *United States ex rel. Goldsby v. Harpole, supra* at 82; *Whitus* v. *Balkcom,* 333 F. 2d 496, 506-07 (5th Cir. 1964). Such Negro counsel are few and far between and are unlikely in the extreme to have available the investigative staffs which the state can muster.

Given the jury selection standards in Alabama and indeed in other states,[6] the evidence almost entirely within the knowledge of state officials ought to continue to come from them, as it has in the past. The entirely subjective standards of juror qualifications of Ala. Code, tit. 30, §21 (1958) ("esteemed in the community for their integrity, good character and sound judgment") coupled with the vague and *ad hoc* procedure approved by the Supreme Court of Alabama make it virtually impossible for a defendant to show "that the commissioners applied different standards of qualifications to the Negro community than they did to the white

---

[5] The former Assistant Attorney General who headed the Civil Rights Division has stated, "The federal government has demonstrated a seeming inability to make significant advances, in seven years time, since the 1957 law, in making the right to vote real for Negroes in Mississippi, large parts of Alabama, in Louisiana, and in scattered counties in other states." Marshall, *Federalism and Civil Rights* (Columbia Univ. 1964), p. 37. A crucial aspect of proposed bills to enforce the Fifteenth Amendment is a shifting of the burden of proof to the county concerned rather than the Department of Justice.

[6] See Appendix at p. 1a, *infra.*

community." 33 U. S. L. Week at 4233. It is totally unrealistic to believe that a Negro defendant, faced with the scheme of a jury selection law "completely devoid of standards and restraints," *Louisiana* v. *United States*, 33 U. S. L. Week 4262, 4264, which vests "a virtually uncontrolled discretion," *id.* at 4263, in jury commissioners, will be capable of showing "that the same proportion of Negroes qualified under the standards being administered by the commissioners," U. S. L. Week at 4233. This evidence is peculiarly within the knowledge of those who select the jurors. If Negroes are not as well qualified as whites, then the jury commissioners will have encountered these differences and will be able to produce meaningful evidence of them.

Finally, it is said that the disparity between the percentage of Negroes on the jury venires and the percentage in the eligible population is not sufficient to make out a prima facie case, because, while the selection process is "haphazard" and "imperfect," there is no proof it reflects a "studied" or "purposeful" attempt to discriminate. Language implying the necessity for proof of intentional discrimination has appeared in some of the decisions of the Court, but it has been thought that the only proof required was that a system or course of conduct operate in a discriminatory manner. In *Avery* v. *Georgia*, 345 U. S. 559, the Court disapproved a jury selection procedure whereby names of members of the white and Negro race were put on different colored tickets; the Court held that the Negro defendant's prima facie burden had been met by showing a system susceptible of operation in a racially discriminatory manner and that the state had the burden of showing that purposeful discrimination had in fact not occurred.[7]

[7] See also, for example, the explicit language of *Patton* v. *Mississippi*, 332 U. S. 463, 469, reaffirmed in *Eubanks* v. *Louisiana*,

But as Mr. Justice Clark said in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725, "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." And see, *Rideau* v. *Louisiana*, 373 U. S. 723, 726, where the question of who initiated the television interview of the defendant's confession was "irrelevant"; the fact that it was televised to the community was dispositive.

The requirement of proof of "purposeful" discrimination, as well as the requirement that Negroes prove that they are as well qualified as whites, will in practice, tend to restrict the prohibition of the Fourteenth Amendment to total exclusion, for it is virtually impossible to show a subjective desire to discriminate or to show a misapplication of standards, when vague and subjective standards are applied by a jury commissioner "at his own sweet will and pleasure," *Louisiana* v. *United States*, *supra*, 33 U. S. L. Week at 4264.

B. The Court found "the over-all percentage disparity" between the percentage of Negroes in the population and the percentage on the jury venires "small", saying: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%", 33 U. S. L. Week at 4233.

Petitioner submits that if numbers are to be used in this manner, it should be noted that under-representation on the grand jury was only 7.5% in *Norris* v. *Alabama*, 294 U. S. 587; moreover, a showing of a 10% Negro population and 0% Negro jury participation would seemingly, under the Court's rationale, fail to meet a Negro defendant's prima facie burden of proving jury exclusion.

---

356 U. S. 584, 587. See also, *Hill* v. *Texas*, 316 U. S. 400; as representative of the lower courts, see *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 65 (5th Cir. 1962).

In this case, whereas 26% of the total male population in Talladega County are Negroes, only 10%-15% of the persons appearing on the grand and petit jury venires have been Negroes; additionally, whereas Negroes have served on 80% of the grand juries selected (the number ranging from 1 to 3), no Negro has ever actually served on a petit jury.

The discrepancy between 10-15% and 26% with respect to the venires and the greater discrepancy with respect to actual service on grand juries (in 20% of the cases, no Negro served at all) results in an exclusion ratio of about 50% (10%-15% in relation to 26%). By reference to the exclusion ratio rather than to the percentage discrepancy, one would immediately realize that a Negro population of 13% with 0% Negro jury participation presents a clear prima facie case of discriminatory exclusion. The percentage discrepancy there, as here, is about 13%, but the meaningful figure is the exclusion ratio, which would there be 100%. In this case the ratio is 50%, and the lower courts might well read the instant decision as sustaining discrepancies between a Negro jury participation of 20-30% and a Negro population of 40-60%.

If an exclusion ratio of 50% is not sufficient to shift the burden to the state, it is apparent that only complete or virtual exclusion will be subject to judicial correction. Admittedly, it may be difficult to draw a bright line at which the burden will no longer be on the state. But where the exclusion ratio is so large, the standards of jury selection so subjective, the method of selection so "haphazard" and the knowledge concerning jury selection so personal to the jury commissioners (who have not shown Negroes less qualified than whites), petitioner submits that trial counsel will have an intolerable burden in any case where token inclusion is practiced.

C. The opinion of the Court places an intolerable burden of proof on the Negro defendant in another respect also. While acknowledging that unconstitutional discrimination "may well" result if a prosecutor consistently—and regardless of trial considerations—exercises peremptory strikes so that no Negro could serve on a jury in any criminal case, the Court avoids decision because petitioner failed to make the necessary proof. It is respectfully submitted that petitioner, having shown that no Negro has served on any petit jury in Talladega County, should not have to prove that the prosecutor abused his prerogatives.

Petitioner is obligated by the Court's decision to place the prosecutor on the stand to secure admissions about his intentions during the striking process, admissions which can be expected to be few since they would, in all probability, be of an incriminating nature. See 18 U. S. C. §243, *Fay* v. *New York*, 332 U. S. 261. The defendant in an isolated criminal case, unfamiliar with the continuous course of criminal prosecutions in the county, is unequipped to give evidence on such matter as the prosecutor's striking practices, but the prosecutor is in an excellent position to do so. He can easily establish the absence of a discriminatory pattern of peremptory strikes by showing that Negroes have served on some juries or that defense counsel bear a substantial portion of responsibility for the consistent striking of Negroes.

By placing on the defendant the burden of establishing that the prosecutor struck Negroes for reasons unrelated to the outcome of the case, the Court has formulated a rule of law removed from the realities of trial strategy and courtroom conduct. For all practical purposes the petitioner will receive but illusory protection from *Fay* v. *Noia*, 372 U. S. 391 and *Townsend* v. *Sain*, 372 U. S. 293, because of the Court's requirement that he adduce more

proof than he has already so laboriously placed on the record in this case.

II.

The Court Apparently Did Not Adequately Appreciate the Extent to Which Racial Discrimination Infects the Jury Selection Process in Talladega County.

Suppose that Talladega County had the following rule of court:

> In any case in which the defendant is a Negro, the solicitor shall inquire of counsel for the defendant whether he desires to have Negroes serve on the jury. If counsel for the defendant does not desire them, all Negroes on the venire shall be struck. In all other cases jury selection shall proceed as otherwise required by law.

No one for a moment would doubt that any conviction occurring under such circumstances would violate the Fourteenth Amendment. *Anderson* v. *Martin*, 375 U. S. 399; *Peterson* v. *City of Greenville*, 373 U. S. 244. The court would not indulge in an inquiry as to whether counsel for defendant would have arrived by his own "mental urges," 373 U. S. at 248, at a conclusion to strike Negroes.

But this is precisely what happened here. The record is clear that this solicitor, without variation, at the commencement of criminal cases inquired of counsel for the defendant whether he desired to have Negroes on the jury:

> If I am trying a case for the State, I will ask them what is their wish, do they want them, and they will as a rule discuss it with their client, and then they will say, we don't want them. If we are not going to

> want them, if he doesn't want them, and if I don't want them, what we do then is just take them off. Strike them first (R. 27).

This is corroborated by other testimony of the solicitor:

> Many times I have asked, Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them (R. 20).

This unseemly custom where the prosecutor invites consideration of jurors on the basis of their race appears to be as invariable as a rule of court and no evidence in the record qualifies this conclusion. Regardless of the view the Court takes as to what constitutes misuse of strikes, it ought not approve such conduct on the part of a prosecutor.

CONCLUSION

By requiring petitioner to prove that Negroes are as qualified as whites for jury service in Talladega County the Court has ignored contrary precedents on which both parties relied at the trial. Placing this burden on the defendant stigmatizes the Negro race and is extremely unfair in practice. The Court also fails to attribute due significance to the disparity between the percentage of Negroes in the county (26%) and their percentage on petit jury venires (10-15%). Despite complete exclusion of Negroes from petit jury service, the Court unfairly requires petitioner to show that the prosecutor was more interested in banishing Negroes than in winning cases. In both cases the burden is placed on virtually resourceless counsel for indigent defendants in capital cases, while the state has pertinent information and the ability to gather more. Finally, the Court erroneously approved an unvarying practice of prosecutor-*initiated* conferences with defense attor-

neys as to whether Negroes should be stricken as a preliminary matter, a practice which if embodied in a formal rule of court would be clearly unconstitutional.

This is a capital case,[8] and petitioner respectfully urges that it not be concluded without the most solemn consideration of the substantial practical and doctrinal propositions urged herein, especially when the briefs and arguments of the parties did not focus on several propositions adopted by the Court for the first time.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
PETER A. HALL
1630 Fourth Avenue North
Birmingham, Alabama

Attorneys for Petitioner

FRANK HEFFRON
MICHAEL MELTSNER
MELVYN ZARR
Of Counsel

[8] See, e.g., *Williams* v. *Georgia*, 349 U. S. 375, 391 ("That life is at stake is of course another important factor . . ."); *Hamilton* v. *Alabama*, 368 U. S. 52, 55 ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."); *Chambers* v. *Florida*, 309 U. S. 227, 241 ("Due process of law . . . commands that no such practice as that disclosed by this record shall send any accused to his death"); *Powell* v. *Alabama*, 387 U. S. 45, 56; *Patterson* v. *Alabama*, 294 U. S. 600; and see generally, Prettyman, *Death and the Supreme Court*.

CERTIFICATE OF COUNSEL

The undersigned attorney for petitioner hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

This ..... day of April, 1965.

.....

Attorney for Petitioner

APPENDIX

Qualifications for Jury Service in Eleven Southern States

	Voter	*Good Character*
Alabama	*None*	Code of Ala., Tit. 30, §21: "Male citizens . . . . generally reputed to be honest and intelligent men and esteemed in the community for their integrity, good character and sound judgment."
Florida	Fla. Stat. Ann., §40.01	Fla. Stat. Ann., §40.01: "Law abiding citizens of approved integrity, good character, sound judgment and intelligence."
Georgia	*None*	Ga. Code Ann., §59-201 (grand jurors): "The most experienced, intelligent and upright persons." Ga. Code Ann., §59-106 (jurors generally): "Upright and intelligent citizens."
Louisiana	None, but compare LSA–R.S. §15-172 (juror qualifications) with LSA–R.S. §18-31 (voter qualifications).	L.S.A.–R.S. §15-172: "Persons of well-known good character and standing in the community."
Mississippi	Miss. Code Ann., §1762	*None*
North Carolina	*None*	N.C. General Statutes, §9-1: "Persons . . . of good moral character."
South Carolina	S. C. Code Ann., §38-52	S.C. Code Ann., §38-52: "Male electors . . . of good moral character."
Virginia	*None*	*None*
Arkansas	Grand Juror: Ark. Stat. §39-101 Petit Juror: Ark. Stat. §39-206	Ark. Stat. §39-101: "Temperate and good behavior." Ark. Stat. §39-206: "Good character."
Texas	Vernon's Ann. Tex. Stat., Art. 2133, "Qualified to vote".	Vernon's Ann. Tex. Stat., Art. 2133: "Good moral character."
Tennessee	*None*	Tenn. Code Ann., §22-203: "Integrity, fair character, sound judgment."